JDG, INC.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 87-158 Decided february 16, 1989

Appeal from a decision of Administrative Law Judge David Torbett (NX 6-102-R) denying an application for review of Cessation Orders Nos. 86-10-58-008 and 86-10-58-009.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: Generally

To qualify for an exemption under sec. 701(28)(A) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1291(28)(A) (1982), extraction of coal must be incidental to the extraction of other minerals and constitute less than 16-2/3 percent of the tonnage of minerals removed for purposes of commercial use and sale. The burden of proving entitlement to the exemption rests upon the party claiming it.

APPEARANCES: Charles A. McGee, Esq., Fort Payne, Alabama, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

JDG, Inc. (JDG), appeals from a decision dated October 20, 1986, by Administrative Law Judge David Torbett denying its application for review of Cessation Orders (CO) Nos. 86-10-58-008 and 86-10-58-009 1/ issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE) on August 20, 1986, pursuant to section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. | 1271(a) (1982). The CO's alleged that appellant mined coal at two locations in Jackson County, Alabama, the Higdon and Flat Rock sites, without a surface mining permit from the regulatory authority in violation of section 521(a) of SMCRA and 30 CFR 843.11(a). On September 12, 1986, JDG filed a request for a formal

1/ The CO's were originally designated 86-10-58-03 and 86-10-58-04.

hearing, which was treated by the Hearings Division as a joint application for review and temporary relief from the CO's. A temporary relief hearing was held before Judge Torbett on September 24, 1986, at which relief was denied. JDG did not appeal that decision.

Subsequently, following a second hearing held October 14, 1986, in Birmingham, Alabama, Judge Torbett issued the decision from which JDG has appealed, denying the application for review of the CO's. Judge Torbett issued this decision as an oral ruling from the bench, including in his findings of fact and conclusions of law portions of the verbatim hearing record. He found that OSMRE properly had jurisdiction to issue the CO's because appellant was conducting coal mining operations without a valid surface coal mining permit. JDG asserted it was exempt from SMCRA permit requirements under the terms of section 701(28)(A) of the Act, alleging
that its coal extraction was of other minerals and less than 16-2/3 percent of the tonnage of minerals removed. Nevertheless, Judge Torbett found JDG was not entitled to exemption because it had failed to prove facts showing such entitlement by a preponderance of the evidence. The factfinder found that appellant had provided no evidence to establish that it had sold any material from the mining operations (Decision Appendix 1). He sustained
the CO's, stating

> [t]hat the overall circumstances of the case, that is each element, the amount of money that the materials sold for, the purposes of the material, all of those things have to be taken into consideration in determining whether this case has been proved.
>
> I am not convinced by a preponderance of the proof that this operation is a viable operation, that it is a bonafide mining operation. I am not convinced that this operation is anything more than a way to try to remove coal and not go by the require- ments of the strip mining law.

(Decision, Appendix 1, 5-6). JDG filed a timely appeal to this Board challenging the Judge's findings.

Beginning in March 1986, appellant conducted mining operations on
the Flat Rock and Higdon sites (II Tr. 29). 2/ JDG held permits (DIR-3172 and DIR-P3158) to mine clay, shale, rock, ores, and other minerals from
the Alabama Department of Industrial Relations (DIR) (Exhs. G-1 and G-7; I Tr. 31, 39). The permits were not intended to cover the removal of coal (I Tr. 32, 39).

2/ The record in this case includes transcripts from two hearings. The first hearing was held Sept. 24, 1986, on JDG's application for temporary relief from the CO's pending a full hearing on the merits (relief was denied by Judge Torbett). The second hearing was held on the merits Oct. 14, 1986. References to these hearing transcripts are prefaced by a I and II for the respective hearings.

On March 26, and May 26, 1986, OSMRE Reclamation Specialist Ottis M. Windam, accompanied by JDG representatives, inspected the Flat Rock site to determine if coal was being removed at the site. Windam testified that, on
May 26, about 12 to 15 acres had been disturbed, and about 20 thousand tons of coal had been extracted (I Tr. 30). On August 15, 1986, he observed coal stockpiles being moved from the Flat Rock site to the Nickajack docks on the Tennessee River (I Tr. 34).

Windam inspected the Higdon site on August 12, 1986. He testified the operation disturbed approximately 15 acres, and that about 8 to 9 thousand tons of coal had been removed and stockpiled. Other materials stockpiled at the site included 5,000 cubic yards (cy) of topsoil, 8,000 cy of clay, and 8,000 cy of shale (I Tr. 36-37).

Windham testified that, on the March 26, 1986, visit to the Flat Rock site, Jerrol Bynum, president of JDG reported, JDG was selling fill material for $5 a load (I Tr. 27-28). Windam also indicated that JDG records showed they had a contract to sell 150,000 tons of shale to Martha Stephenson. JDG's records concerning this sale contained an uncashed check for $25,000 (I Tr. 38-39). In addition, the records contained "several sheets of sales" of fill material for "about fifty cents a ton" (I Tr. 39).

Windam admitted that the amount of coal extracted from each site was less than 16-2/3 percent of the tonnage of other materials taken from the sites, running closer to 10 percent of total weight extracted (I Tr. 47-49, II Tr. 55-56). Nevertheless, he issued the CO's when appellant began moving coal from the Flat Rock site to the Nickajack docks (I Tr. 53). Windam issued both CO's, requiring appellant to cease all coal mining activities, to stop removing any coal from both sites, and to immediately seek valid surface mining permits from the State regulatory authority.

JDG maintains that its operation was not directed towards removal of coal, but was rather a shale and clay operation. It argues no environmen-tal harm has been done to the land. Jerrol Byrum, president of JDG, testi- fied the company obtained DIR permits by posting a bond of $150 per acre
(I Tr. 56). He testified that the coal at the sites was a 6- to 8-inch
seam at a depth of 14 feet, and that JDG removed a layer of clay below the coal from both sites (I Tr. 61-62) for sale. Shale sold by JDG overlay
the coal seam in depths varying from 10-20 feet (II Tr. 41). The clay had characteristics which made it valuable for construction of lakes, roadbeds, and chicken house pads (II Tr. 15-16). He stated JDG had reclaimed most
of both sites (I Tr. 55-62). No coal had been sold because it was of poor quality (II Tr. 21-23). The cost to remove the coal was $14 to $15 a ton (II Tr. 24). The coal was moved from the Higdon site because the landowner required its removal, and to permit reclamation to begin (II Tr. 25-26).

On cross-examination Byrum admitted that JDG's contract for the sale of 75 thousand tons of material at 50 cents a ton was actually being "traded out for dozer work" (I Tr. 66). On the contract for sale of 150 thousand

tons of shale to Martha Stephenson, JDG had not yet cashed her check for $25,000, although a large percentage of the material required by the con- tract had been delivered (I Tr. 68, 74; Exh. A-4). Byrum testified that
JDG intended to sell coal stockpiled at Nickajack docks and at the Higdon site for $17 to $18 per ton.

Byrum could not say how much money the company's operations had made nor could he be sure the company could continue to operate without selling the coal (I Tr. 77). Nonetheless, he stated JDG had been operating without selling the coal for about a year (II Tr. 25).

JDG first alleges it did not receive "a decision within the time allowed by the applicable rules and regulations." It does not make clear which decision this statement refers to, nor has it provided any evidence with this appeal to substantiate that any decision in the adjudication process was not timely received or that JDG was entitled to a decision in
a shorter time.

On September 2, 1986, an informal hearing was held concerning both CO's in Chattanooga, Tennessee. An OSMRE written decision dated September 5, 1986, sustaining the CO's, was issued within 5 days after the hearing as required by 43 CFR 843.15(f). Complaint of untimely receipt of that deci- sion should have been raised at the temporary relief hearing held on September 24, 1986, but was not so raised.

Arguments made at the hearing (II Tr. 6-9, 57) indicate JDG may be complaining that Judge Torbett's decision on its application for review was not issued within 30 days of the date it filed its application for review
on September 12, 1986. The application for review filed did not contain a valid request for an expedited decision, since none of the procedures set out in 43 CFR 4.1184 and 4.1187 were followed. In any event, by ruling
from the bench on October 13, 1986, which is within 30 days (as extended to account for nonbusiness days) Judge Torbett met the 30-day deadline. See 43 CFR 4.1187(e); Delight Coal Corp., 1 IBSMA 186, 194-95, 87 I.D. 321, 325 (1979; 43 CFR 4.1185.

In its statement of reasons JDG contends that OSMRE lacks jurisdiction to act herein because authority to issue CO's is vested entirely in the State of Alabama. In administrative review proceedings under SMCRA a person contesting OSMRE's jurisdiction must state and prove the grounds upon which this affirmative defense is based. Harry Smith Construction Co. v. OSMRE, 78 IBLA 27, 29 (1983). OSMRE's initial burden in a review proceeding is limited to a prima facie showing that the person named in the notice or order was "engaged in a surface coal mining operation and failed to meet Federal performance standards." Rhonda Coal Co., 4 IBSMA 124, 134, 89 I.D. 460, 465 (1982).

It must be shown there were surface coal mining operations as defined in 30 U.S.C. | 1291(28) (1982) and that the activity caused a violation
of one or more of the regulations governing surface coal mining. Such a

showing by OSMRE as to the validity of the notice or order under 43 CFR 4.1171(a) shifts the burden of going forward to the applicant for review. The ultimate burden of persuasion then falls upon the applicant for review. 43 CFR 4.1171(b).

If OSMRE'S jurisdiction is challenged because a surface coal mining operation is excepted from coverage by the Act, the proponent of the claimed exemption must go forward with evidence to show lack of jurisdiction and must carry the ultimate burden of persuasion, if OSMRE attempts to rebut the offered evidence. 43 CFR 4.1171(b); Cumberland Reclamation Co., 102 IBLA 100, 104 (1988). Merely voicing an opinion is not sufficient to establish an affirmative defense. Sam Blankenship, 5 IBSMA 32, 39, 90 I.D. 174, 178 (1983).

JDG contends it had valid permits from the Alabama DIR, and therefore needed no other permits from the State to conduct its operations. Neverthe-less, the DIR permits did not provide for coal removal. The record estab- lishes, therefore, that there were no proper coal mining permits issued by the appropriate State regulatory authority, even though over 250 tons of coal were removed from each site, and more than 2 acres were disturbed at each site. It also appears from arguments made at hearing (II Tr. 58) JDG may be complaining that OSMRE should have issued a 10-day notice to the State before taking enforcement action by issuing the CO's, and that OSMRE lacks jurisdiction because it failed to do so (II Tr. 58).

OSMRE, in its oversight capacity, is required by the Act to take action where it finds that coal is being mined without a permit. An authorized representative of the Secretary shall immediately order a cessation of sur- face coal mining and reclamation operations where he finds in the course of a Federal inspection any condition, practice, or violation of the Act which creates an imminent danger to the health or safety of the public or which is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources. 30 U.S.C. | 1271(a)(2) (1982); 30 CFR 843.11(a)(1). Surface coal mining and reclamation operations conducted without a valid surface coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm. 30 CFR 843.11(a)(2). Because appellant was operating without a valid surface coal mining permit, OSMRE was required to issue the CO's in question.

[1] The question whether JDG was entitled to an exemption from SMCRA because coal constituted less than 16-2/3 percent of total tonnage removed from either site must therefore be considered. Section 506(a) of SMCRA, 30 U.S.C. | 1256(a) (1982), provides that "no person shall engage in or carry out on lands within a State any surface coal mining operations unless such person has first obtained a permit issued by such State pursuant to an approved State program * * *." The statutory definition of surface coal mining operations excludes "the extraction of coal incidental to the extrac-tion of other minerals where coal does not exceed 16-2/3 per centum of the tonnage of minerals removed for purposes of commercial use or sale."

30 U.S.C. | 1291(28)(A) (1982) (emphasis added). Whether the removal of coal is incidental to a mining operation is not determined exclusively
by a calculation of the relative tonnage of minerals removed. The Board recently examined this issue in McNabb Coal Co. v. OSMRE, 101 IBLA 282, 289 (1988), appeal filed McNabb Coal Co. v. Hodel, No. 88 C-1525E (N.D. Okla.), (Nov. 14, 1988) stating:

> Interpreting the term 'incidental' in the proviso to section 1291(28) (A) as being defined solely by the less than 16-2/3 percent of the tonnage of minerals removed language is contrary to widely accepted rules of statutory construction. A statute should be construed so as to give effect to all of its provisions, so that no part will be inoperative or superfluous. 2A Sutherland Stat Const sec. 46.06 (4th ed. 1984). Here the statute clearly provides the extraction of coal must be inci-dental to the mining operation, as well as constituting less
> than 16-2/3 percent of the tonnage produced. Hence, it must
> be determined whether the production of coal in this case was incidental to the mining operation.

In McNabb the Board recognized it was necessary to examine the record as a whole to determine if the extraction of coal is essential to the prof- itability of the mining operation. Where removal of coal for commercial
use or sale is essential to an operation it does not qualify for the 16-2/3 percent exemption. Id. at 291.

JDG has failed to provide sufficient evidence to establish that removal and sale of coal from the Flat Rock and the Higdon sites was not essential to its operations. JDG claimed it made sales of truckload lots of clay or shale from the sites, but provided no records to substantiate such sales. It offered proof of one contract for the trade of materials for tractor work and another contract, for which it had yet to receive any payment, to prove it was conducting a viable mining operation without sale of coal. Aside from these two instances, the testimony of JDG's president, Jerrol Byrum, was conclusory about the amount of money made by the operation from sales of shale and clay. He failed to establish that JDG did not need to sell coal to continue to operate.

The coal produced by JDG from both sites was located between layers
of shale and clay (II Tr. 39-46). The coal seam varied from 1-3 feet in thickness (II Tr. 39). The clay beneath it was about 24 inches thick,
on average (II Tr. 41). To reach the clay and coal, it was necessary
to remove the shale layer, a material found at numerous locations in
the vicinity (II Tr. 43-44). The shale layer was about 6-10 feet thick
(Tr. 45).

Viewing appellant's evidence in its best light, and assuming, with-
out deciding, that the materials described as shale and clay constituted minerals removed for commercial purposes within the meaning of 30 U.S.C.

| 1291(28)(A) (1982), 3/ we nonetheless conclude that JDG has failed to show entitlement to the exemption claimed.

JDG failed to show sale of coal was not essential to its operations. There is no hard evidence that JDG extracted and sold any of the clay and shale for sale for commercial purposes during the entire life of the operation described, except for the barter arrangement described by JDG's president. The only other transaction offered by JDG to prove commercial sales--the transfer based upon the uncashed check--was apparently incom- plete. Even assuming that these two transactions were commercial sales, it is clear that the extraction of coal was essential to profit making by JDG in the circumstances described by the record. While other casual sales of clay or shale may have occurred, no record of them has been produced. Without the sale of coal, as Judge Torbett found, the operation could not be maintained.

Accordingly, we find that coal removal was not incidental to the profitability of this mining operation. One claiming an exemption under SMCRA bears the burden of affirmatively demonstrating entitlement to the exemption. Cumberland Reclamation Co., supra; McNabb Coal Co., supra at 291; S & S Coal Co. v. OSMRE, 87 IBLA 350, 354 (1985); S & M Coal Co. v. OSMRE, 79 IBLA 350, 91 I.D. 159 (1984). Appellant has failed to meet its burden of showing that its operation qualifies for the exemption claimed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

3/ The parties disagreed at hearing concerning the nature of the material removed and sold by JDG. OSMRE argued that it was "overburden" and did not constitute "minerals removed for purposes of commercial use." JDG argued the material consisted of commercially valuable clay and shale possessing unusual characteristics. Because our disposition of this appeal is made on other grounds, we need not reach the question whether the material removed by JDG was a mineral within the meaning of 30 U.S.C. | 1291(28)(A) (1982).